IN THE

SUPREME COURT OF THE UNITED STATES

No. 12 Original.

EX PARTE THE UNITED STATES,

Petitioner.

SUPPLEMENTAL BRIEF

EDWIN J. MARSHALL,
Counsel for Respondent.

TOLEDO, OHIO, JANUARY 18, 1916.

Merry Robbers of the Skies
THE ACADEMY LEGAL OUTLET & RESOURCE CO.

In the Supreme Court of the United States

No. 14 Original.

EX PARTE THE UNITED STATES,

Petitioner.

SUPPLEMENTAL BRIEF.

Because of the general interest in this case, and the desire of the respondent and his counsel to present it as fully as possible, permission is asked to file this supplemental brief.

First as to proof of the facts showing the exercise of the power in question.

The facts are peculiarly within the knowledge of the Department of Justice in that a search of the court records will disclose the extent of the exercise of this power.

The respondent cannot be expected, in a case of this nature, to search every record of every court, at his own expense, so as to present the facts to this court, but he has based the statements, as to the practice set forth in his response, upon letters to him from district judges throughout the United States. The facts alleged as to the exercise of the power in Ohio and Michigan federal courts were based upon a careful search of the court records at Detroit, Toledo, Cleveland, Columbus and Cincinnati, back to 1850.

Court records in New York state courts show the exercise of the power before 1820.

If this court shall hold it cannot take judicial notice of the practices of trial courts, or if the facts stated in the respondent's answer cannot be accepted as fairly showing the extent and course of the practice, then the respondent desires an opportunity to show the facts in such manner as this court may consider proper.

Respondent suggests that the facts may be shown by letters from judges and clerks of courts, and if the Department of Justice insists upon formal proof, it should undertake a comprehensive search of the records of the courts.

A search of the records of the Federal Courts will, without doubt, show how general and uniform the practice has been for the past sixty years or more and its origin may be developed.

The burden of showing the exact facts, if it becomes necessary to have exact facts, would seem to be on the Department of Justice rather than on the respondent.

If the proofs shall fail to show the exercise of this power at common law and a continuous and uniform use of the power since the earliest times, it is submitted, a proper expansion or development of the common law power will be shown.

By submitting the case on briefs and oral argument, the respondent did not intend to waive the right to show the facts as to history and extent of this practice, if this court shall hold such proof to be necessary to a determination of this case.

Next as to the law of Ohio. The Government has cited a decision by Judge Kinkead of the Franklin County Common Pleas Court and claims the practice

is unsettled in Ohio, notwithstanding the Weber and Whiting cases.

In respondent's personal memorandum (pp. 13, 14, 15) it is shown from the record of the Whiting Case (83 Ohio State, 447), how clearly the Supreme Court of Ohio adhered to the principle of the Weber Case, and how surely was the decision of the *nisi prius* Judge Kinkead at variance with the court of last resort of his state.

The situation in Ohio is further shown by an opinion of its Attorney General under date of July 12, 1915 (2 Department Reports of Ohio, 1030), from which the following is quoted:

> "Therefore in the light of this decision (*State vs. Whiting*) and until it is overruled by the Supreme Court, I am compelled to advise you that, notwithstanding the plain provisions of Section 13706 *et seq.* of the General Code, the court has inherent power to suspend the sentence of the defendant in question. The entry should show that the suspension is made under the inherent power of the court and not under the statute."

The case of *State ex rel. vs. Beacom,* 66 O. S., 491, 508 (1902), is cited to show a civil case in which execution of judgment was suspended as in the interest of the public. Mr. Justice Day will be familiar with the conditions which lead up to the decision in the Beacom case.

The case of *United States vs. Birdsall,* 233 U. S., 223 (1914), is cited to show the conviction of a defendant for bribing an officer to induce a judge to suspend a sentence (206 Federal, 816). It is difficult to see how a conviction could be sustained if the suspension of sentence was void.

In conclusion it is submitted the custom and practice of our federal courts for a very long time, at the

least during the past sixty years, is of so high authority that it should not be overturned without better proof, than has been tendered, that it is lacking the foundation necessary to make it legal.

If the Attorney General is convinced that the practice leads to bad results or, notwithstanding its many years of use, may lead to bad results, in view of the long existence of the practice, perhaps he, rather than the respondent, should seek the aid of Congress.

We have never contended that the power is inherent beyond the power of the Legislature to limit its exercise as the power to punish for contempt in *facie curiae* is inherent in the courts, but that it is one which abides in an inferior court under the Constitution, as a common-law incident of jurisdiction, until clearly modified or abated by specific legislation.

In distinction from the inherent power over contempt (*U. S. vs. Hudson,* 7 Cranch, 32), it is a power which may be dispensed with as not essential to the existence of the court.

The respondent did not intend to waive the right to show the facts as to the history and extent of this practice, if this court shall hold such proof to be necessary to a determination of this case.

The respondent has shown, if the court accepts his return, and will show if the court requires, better proof than the admissions of fact in the Government's reply to the respondent's return, that there has been a somewhat general and long-continued practice to which both law-makers and citizens have become adjusted, a practice which commends itself when a "Government is a practical affair, intended for practical men;" and it is submitted such weight should now be given to this usage, practice or custom in determining the existence

of the power that the Government should carry the burden to defeat it, not the respondent to defend it. (*U. S. vs. Mid-West Oil Company,* 236 U. S., 459, 472.)

Respectfully submitted,

EDWIN J. MARSHALL,
Counsel for Respondent.

TOLEDO, OHIO, JANUARY 18, 1916.